

EST. 1929
MILLER MORTON CAILLAT & NEVIS, LLP
ATTORNEYS AT LAW

July 24, 2009

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Joseph A. Scanlan, Jr.
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By Facsimile (408) 971-4883, E-Mail and First Class Mail

Michael O'Connell
Division Manager
Transportation & Hydraulics Services Division
City of San Jose, Dept. of Public Works
1661 Senter Road, Building A, First Floor
San Jose, CA 95112

Re: Albany-Kiely Storm Drain Improvement, Phase V-VI Project
Notice of Rejection of Bid Proposal from Rodan Builders, Inc.
Our File No. 45670-0902

Dear Mr. O'Connell:

We represent Rodan Builders, Inc. ("Rodan"). Rodan has forwarded us your letter of July 8, 2009, indicating that the City of San Jose ("City") had completed its review of the bid protest submitted by McGuire and Hester, and concluding that the City has rejected Rodan's bid as non-responsive for failing to list a certified subcontractor to perform the stamped asphalt work.

The City's analysis regarding the responsiveness of Rodan's bid is both factually and legally incorrect. We therefore write to request that the City reconsider its decision to reject Rodan's bid prior to the City Council Meeting on August 25, 2009. The bases of the City's apparent error and Rodan's request for reconsideration are as follows:

1. Rodan was not required to list a subcontractor performing less than ½ of 1% of the total bid amount.

As you are aware, Section 2-1.15A of the City's 1992 Standard Specifications (as modeled after California Public Contracts Code § 4106) provides that each bidder shall set forth in its proposal:

"The name and location of the place of business of each subcontractor who will perform work or labor or render services to the Contractor in or about the construction of the work or improvement, or a subcontractor

licensed by the State of California who, under subcontract to the Contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, *in an amount in excess of ½ of one percent of the Contractor's total bid or \$10,000, whichever is greater.*

In its proposal, a copy of which is attached hereto for your convenience as Exhibit A, Rodan did not list a subcontractor for Bid Item No. 9, stamped asphalt. This was because the subcontractor bid that Rodan received for the stamped asphalt work was less than ½ of one percent of its total bid amount.

Specifically, Rodan received a proposal from Cook Engineering, Inc. on June 11, 2009 for the entire 1,340 square feet of stamped concrete work. The amount of the proposal from Cook Engineering, Inc., which is a certified stamped asphalt installer, was \$4,087.00. This amount is less than ½ of one percent of Rodan's total bid amount, calculated as follows:

| | |
|---------------------------------------|--------------|
| Rodan's Total Bid Amount: | \$855,053.80 |
| ½ of One Percent: | \$ 4,275.27 |
| Cook Engineering Proposal: | \$ 4,087.00 |
| Cook Percentage of Rodan's Total Bid: | .47% |

Consequently, because the stamped asphalt proposal from Cook Engineering was less than ½ of one percent of Rodan's total \$855,053.80 bid, Rodan was not required by Section 2-1.15(A) of the City's Standard Specifications or Public Contracts Code §4106 to separately list Cook Engineering, Inc. as a subcontractor in its bid. A copy of Cook Engineering's proposal, previously provided to the City in Rodan's letter of July 13, 2009, is attached hereto as Exhibit B.

2. The City's exclusive use of the bid extension (Schedule of Quantities) form to determine Rodan's responsiveness is inappropriate.

Your letter of July 8, 2009 implies that the City based its decision to reject Rodan's bid as non-responsive upon the amount for the stamped asphalt work listed by Rodan on the Schedule of Quantities form.

The Schedule of Quantities form (page 1A of 3 of the Proposal) submitted by Rodan lists 1,340 square feet of stamped asphalt work at \$5.07/square foot, thus indicating \$6,793.80 as the total cost of the work. Although \$6,793.80 would admittedly exceed ½ of one percent of Rodan's bid, this amount is the total cost of that scope of work to the City and was not intended by Rodan to reflect the amount that will be paid to Cook Engineering.

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The discrepancy was created by ambiguity in the City's Proposal forms. The bottom of the Schedule of Quantities form is the only location in the Proposal where the bidders are required to state the total amount of their respective bids. However, the form itself has no separate line items for the bidders to list their own overhead, profit, or general conditions costs. Furthermore, there are no instructions to the bidders stating that the amounts to be included in the Unit Price and Extension columns on the form are limited to the amount that the *subcontractor is charging the bidder* for the work (as opposed to, for example, the City intending each bidder to list the total Unit Price and Extension that the *bidder intends to charge the City* for each scope of work).

The City's Schedule of Quantities form therefore creates an inherent ambiguity in each bidder's Proposal because the form does not permit the bidder to distinguish the percentage of the Unit Price or Extension that will be paid to the subcontractor from the bidder's own costs for overhead and profit.

The Proposal prepared by the City and upon which all bidders must submit their bids expressly states that the Contractor "*will take in full payment therefore the following price or unit prices as shown in the Schedule of Quantities on the next page.*" See, Proposal, p. 1 of 3 (italics added). In completing the Schedule of Quantities form, Rodan therefore reasonably assumed that the City required each bidder to list the *total* Unit Price for each scope of work that it would accept, including the amount of its own mark-up for overhead and profit. As indicated, because the form does not include any separate line for the general contractor's own costs, Rodan appropriately allocated these costs between the various line items of work.

Rodan's bid is therefore ultimately responsive because the amount being paid to Cook Engineering for the stamped asphalt work (i.e., \$4,087.00) is less than the 1/2 of one percent benchmark established in Section 2-1.15(A) of the City's Standard Specifications.

3. The Omission to list Cook Engineering is immaterial to the total amount of Rodan's bid, gave Rodan no competitive bidding advantage, and is thus insufficient grounds to reject Rodan's bid as non-responsive.

California law provides that a non-substantial or immaterial irregularity in a bid may be waived by the awarding authority. See, *Universal Buy-Products v. Modesto*, 43 Cal.App.3d 145 (1974). In fact, the City specifically reserved this right in its Proposal, which requires all bidders to acknowledge that, "the City reserves the right to reject any or all bids and to waive any informalities in the bidding." See, Proposal, p. 2 of 3.

Generally, a "substantial departure" includes any deviation that could be a vehicle for favoritism, a fact that affects the amount of the bid, or that might otherwise influence potential bidders to refrain from bidding. *Tonica Business Machines USA, Inc. v. Regents of UC*, 206 Cal.App.3d 449, 454 (1988).

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Thus, a substantially conforming bid, even if not strictly responsive, should nevertheless be accepted if the variance cannot and did not affect the amount of the bid or give the bidder an advantage or benefit not allowed other bidders. See, *Universal Buy Products Menessee v. County of Fresno*, 163 Cal.App.3d 1175 (1985). In the *Universal* case, the low bid was challenged because the bidder failed to sign the appropriate line on the proposal sheet of its bid form although the form was signed in other places and was accompanied by a signed bid bond. A losing bidder protested the bid arguing that the failure to sign the form at all of the locations required invalidated the bid. The County concluded that the failure to sign the form in all of the locations did *not* invalidate the bid and that the bid substantially conformed to the bid requirements and was responsive. The reviewing court upheld the County's decision. The court concluded that because the bidder gained no advantage over other bidders, the County could waive the immaterial defect. Further, because the low bidder could not refuse to enter the contract based upon its failure to sign one portion of the bid form, the bid was deemed responsive.

In this case, given the apparent ambiguity in the City's Proposal, Rodan's decision to include its own costs in the Unit Price and Extension columns on the Schedule of Quantities form was immaterial and created no competitive advantage over other bidders. The inclusion of both Cook Engineering's and Rodan's proposed costs for the stamped asphalt work did not alter the total amount of Rodan's bid. Furthermore, Rodan could *not* claim it made a mistake, attempt to pull its bid, or simply refuse to perform because it did not separately list the cost of Cook Engineering's work. In fact, the ambiguity in the City's Proposal forms creates the opposite effect—namely, bidders including *only* the subcontractor's cost of the work on the Schedule of Quantities form might subsequently claim an error or attempt to pull their bid by asserting that they inadvertently omitted to include their *own* costs in the Proposal. Those other bidders, unlike Rodan, would receive a competitive bidding advantage by asserting the right to increase their price.

The City should therefore exercise its discretion to waive any irregularity in Rodan's bid as immaterial.

4. The City never afforded Rodan an adequate opportunity to review and respond to the bid protest.

The City notified all bidders on June 24, 2009 that Rodan was the lowest responsive, responsible bidder. Thereafter, on July 1, 2009, Rodan was notified by email that the City had received a bid protest. Although the email from Mr. Andaya, the City's project manager, indicated that City staff was reviewing the merits of the protest, Rodan was never sent a copy of the actual protest and was never asked for information to respond to the protest.

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On July 7, 2009, Rodan was notified by email that the City was still reviewing the bid protest, and that it would be contacted as soon as the City completed its evaluation.

One week later, on July 13, 2009, and without having the opportunity to address any concerns raised by the protest, the City notified Rodan that it had accepted the protest from McGuire and Hester, and had rejected Rodan's bid as non-responsive. When Rodan responded by letter that same day (see, Exhibit B), they were informed that all comments would have to be addressed directly to the City Council at the next scheduled meeting on August 25, 2009.

The City's decision not to provide Rodan with a copy of the actual bid protest or to provide an opportunity for Rodan to respond prior to issuing the decision rejecting Rodan's bid as non-responsive appears to be both a blatant violation of City policy and Rodan's due process rights. Fortunately, there is still an opportunity to correct this situation prior to the City Council meeting on August 25th.

Rodan and its counsel request an opportunity to discuss this matter directly with City staff, including yourself, Mr. Andaya, Katy Allen, and the City attorney assigned to this matter. Please contact me regarding your availability for a meeting at the City's offices in the next two weeks.

Very truly yours,

MILLER, MORTON, CAILLAT & NEVIS, LLP

By:


CHRISTOPHER J. HERSEY

Enclosure

cc: Dan Oliver (Rodan Builders)

EXHIBIT A

EXHIBIT A

PROPOSAL TO CITY OF SAN JOSÉ

COPY

FOR

ALBANY-KIELY STORM DRAIN IMPROVEMENT PHASE V-VI

Name of Bidder: Rodan Builders, Inc.

The representations herein are made under penalty of perjury.

To: The City of San José, State of California

The undersigned, as bidder, declares that the only person or parties interested in this proposal as principals are those named herein; that this proposal is made without collusion with any other person, firm or corporation; that the bidder has thoroughly read and examined and has full knowledge of and understands all the provisions and contents of this proposal and the documents which must be attached hereto, the Specifications approved by the Director of Public Works on May 1, 2009, entitled ALBANY-KIELY STORM DRAIN IMPROVEMENT PHASE V-VI and the Specifications approved by the Director of Public Works on May 1, 2009, entitled ALBANY-KIELY STORM DRAIN IMPROVEMENT PHASE V-VI on file in the office of the Director of Public Works of the City of San José in City Hall, San José, California; that the bidder has thoroughly examined said Specifications which are on file in the office of the Director of Public Works, and that the bidder has full knowledge of and understands said Specifications and the requirements thereof; and that the bidder has further read and understands, and has knowledge of the contents of any and all addenda to said Specifications on file; and that the bidder proposes and agrees, if this proposal is accepted, that the bidder will contract with the City of San José, in the form of a copy of the contract on file in the office of the Director of Public Works, to do all the work and furnish all materials specified or referred to in the contract, in the manner and time therein prescribed, and according to the requirements of the City or Director of Public Works as therein set forth, to furnish the contract, bonds and insurance specified in the Specifications, and to do all other things required of the Contractor by the contract; and will take in full payment herefor the following price or unit prices as shown in the Schedule of Quantities on the next page(s).

If the bidder or other interested persons is a corporation, state legal name of corporation, also names of the President, Secretary, Treasurer, and the Manager thereof; if a partnership, state the name of the partnership, if one exists, also the names of all the partners comprising the partnership; if any of the partners are individuals, state the first and last name of every individual in full, if any of the partners are corporations, state for each such corporation, the information required above of corporations; if any of the partners are partnerships, state for each such partnership the information required above of partners; if the bidder or other interested person is a joint-venture, state the name of the joint venture, also names of all joint venturers comprising the joint venture; if any of the joint venturers are individuals, state the first and last name of every individual comprising the joint venture; if any of the joint venturers are corporations, state for each corporation the information required above of corporations; if any of the joint venturers are partnerships, state for each such partnership, the information required above of partners; if bidder or other interested persons is an individual, state first and last names in full.

If bidder is an individual, the bidder's signature shall be placed below; if bidder is an individual, doing business under a fictitious name, the name of the individual followed by the words "doing business under (insert the fictitious name)" shall be set forth above, together with the signature of the individual; if bidder is a corporation, the legal name of the corporation shall be set forth above, together with the signature of the officer or officers of the corporation, authorized to sign contracts on behalf of the corporation, the corporate title; that is Vice-President, Secretary, etc., should be placed below the name of the officer and the corporate seal affixed; if bidder is a partnership, the legal name of the partnership, if one exists, shall be set forth above, together with the signature of the partner or partners authorize to sign contracts on behalf of the

SCHEDULE OF QUANTITIES

PROJECT: Albany-Kiely Storm Drain Improvement Phase V-VI

CONTRACTOR:

File No.: 5345-34

| SUPP. NO. | SPEC. SECT. | ITEM DESCRIPTION | UNIT | EST. QTY. | UNIT PRICE | EXTENSION |
|-----------|-------------|--|------|-----------|------------|------------|
| 1 | 5-2 | Street Clean-up (Minimum \$500 per day) (Revocable) | Day | 89 | 500.- | 44,500.- |
| 2 | 11-1 | Mobilization (\$42,500 Fixed Bid) | L.S. | 1 | \$42,500 | \$42,500 |
| 3 | 12-1 | Traffic Control | L.S. | 1 | 60,000.- | 60,000.- |
| 4 | 12-2 | Police Officer (min. \$50.00 per hr.) (Revocable) | Hr. | 250 | 50.- | 12,500.- |
| 5 | 15-1.02 | Additional Potholing (Revocable) | Ba. | 5 | 1,500.- | 7,500.- |
| 6 | 15-3 | Utility Conflict (\$15,000 Fixed Bid) (Revocable) | L.S. | 1 | \$15,000.- | \$15,000 |
| 7 | 20-2 | Replace Three (3) Traffic Calming Circles | L.S. | 1 | 45,000.- | 45,000.- |
| 8 | 25-1 | Additional Backfill Material (Revocable) | Ton | 100 | 75.- | 7,500.- |
| 9 | 39-1.01 | Stamped Asphalt (Revocable) | S.F. | 1,340 | 5.07 | 6,793.80 |
| 10 | 39-1.02 | Additional Asphalt Concrete Pavement (Revocable) | Ton | 90 | 150.- | 13,500.- |
| 11 | 73-1 | Additional Curb and Gutter (Revocable) | L.F. | 100 | 80.- | 8,000.- |
| 12 | 81-2 | Replace City Standard Survey Monument (Revocable) | Ba. | 5 | 1,000.- | 5,000.- |
| 13 | 1301-2 | Trench Sheet piling, Shoring and Bracing | L.S. | 1 | 15,000.- | 15,000.- |
| 14 | 1301-5 | Temporary Trench Pavement (Revocable) | L.F. | 2,830 | 12.00 | 33,960.- |
| 15 | 1301-7 | Bedding Stabilization Material (Revocable) | Ton | 550 | 100.- | 55,000.- |
| 16 | 1302-2 | Install 12-inch HDPE Smooth Interior Corrugated Exterior, Type S | L.F. | 285 | 95.- | 27,075.- |
| 17 | 1302-2 | Install 15-inch HDPE Smooth Interior Corrugated Exterior, Type S | L.F. | 275 | 115.- | 31,625.- |
| 18 | 1302-2 | Install 24-inch HDPE Smooth Interior Corrugated Exterior, Type S | L.F. | 1,570 | 130.- | 204,100.- |
| 19 | 1302-2 | Install 36-inch HDPE Smooth Interior Corrugated Exterior, Type S | L.F. | 700 | 155.- | 108,500.- |
| 20 | 1305-1 | Standard Manhole, (D-11) | Ba. | 1 | 7,500.- | 7,500.- |
| 21 | 1305-1 | Standard Concentric Manhole, (D-12) | Ba. | 11 | 8,000.- | 88,000.- |
| 22 | 1305-1 | Standard Regular Hooded Inlet | Ba. | 3 | 5,500.- | 16,500.00 |
| | | | | | TOTAL | 855,053.80 |

partnership; if any of the partners are corporations, execution for such partners shall be accomplished in accordance with the requirements set forth above for corporations; if any of the partners are partnerships, execution for such partners shall be accomplished in accordance with the requirements set forth above for partnerships; if bidder is a joint venture, the legal name of the joint venture, if one exists, shall be set forth above for partnerships. If signature is by an agent other than an officer of a corporation, or member of a partnership or a joint venture, a Power of Attorney must be on file with the City Clerk prior to opening bids or submitted with the bid; otherwise, the bid may, at the City's option, be disregarded as non-responsive.

If this proposal shall be accepted and the undersigned shall fail to contract, and to give the Contractor's Bond For Faithful Performance and the Contractor's Payment Bond required by the specifications and contract and by law, and to provide all insurance as required by said contract, within eight (8) days after the bidder has received notice from the City of San José, the City may, at its option, determine that the bidder has abandoned his/her contract, and thereupon this proposal and the acceptance thereof shall be null and void, and the forfeiture of such security accompanying this proposal shall operate and the same shall be the property of the City of San José.

In accordance with Public Contract Code, Section 10232, the Contractor, hereby states under penalty of perjury, that no more than one final unappealable finding on contempt of court by a federal court has been issued against the Contractor within the immediately preceding two year period because of the Contractor's failure to comply with an order of a federal court which orders the Contractor to comply with an order of the National Labor Relations Board. Signing this Proposal on the signature portion thereof shall constitute signature of this Statement.

Accompanying this proposal are the following documents completely filled in by the bidder and the same are incorporated herein by reference:

1. Cash, a cashier's check or a certified check made payable to City, or a bidder's bond executed by an admitted surety insurer naming the City as beneficiary, in an amount equal to at least ten percent (10%) of the total amount bid including all alternatives.
2. A list of subcontractors for work over one half of one percent, if any; the address of each subcontractor and the description of work to be done by each subcontractor.
3. A statement of financial responsibility, technical ability, and experience if such information is not already on file with the City.

City may at its option, request additional supplemental information after bid opening.

Bidder understands that the City reserves the right to reject any or all bids and to waive any informalities in the bidding.

The undersigned, as bidder, declares that in listing subcontractors in this bid, I have not discriminated or given any preference to any firm based on race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin. I understand that any such discrimination or preference is in violation of Chapter 4.08 of the Municipal Code.

Execution of the Non-Collusion Affidavit constitutes execution of this Bid Proposal including the above statement of nondiscrimination and, with the exception of the Bidder's Bond or Addenda, if any, no other signatures will be required.

NONCOLLUSION AFFIDAVIT

Project Title: ALBANY-KIELY STORM DRAIN IMPROVEMENT PHASE V-VI

Dan Oliver of Rodan Builders, Inc., being first duly sworn, deposes and says that he/she is

the party making the foregoing bid that the bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation; that the bid is genuine and not collusive or sham; that the bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid, and has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that anyone shall refrain from bidding; that the bidder has not in any manner, directly or indirectly, sought by agreement, communication or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder, or to secure any advantage against the public body awarding the contract of anyone interested in the proposed contract; that all statements contained in the bid are true; and further, that the bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid, and will not pay, any fee to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof the effectuate a collusive or sham bid.

In accordance with Title 23, United States Code, Section 112, the bidder hereby states, under penalty of perjury, that he/she has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with this contract. Bidders are cautioned that making a false certification may subject certifier to criminal prosecution.

The undersigned declares under penalty of perjury that the information contained in this proposal and all accompanying documents are true and correct.

Executed on June 11, 2009

Rodan Builders, Inc.

Legal Company Name

Corporation

Indicate Type of Entity: Sole Proprietorship,

Partnership (General/Limited Partners),

Corporation, Joint Venture, etc.

City Business Lic. No.: 20769707

Expiration Date: 3/31/10

State Contractor Lic. No.: 858119

Classification: A, B, C-21

Expiration Date: 4/30/11

Federal I. D. No.: 20-2164714

Address: 859 Cowan Road

Burlingame, CA 94010

By:

Title: Dan Oliver - C.F.O.

Telephone: (650) 508-1700

NOTARY

***** SEE ATTACHED ACKNOWLEDGMENT *****

On _____ before me, _____, personally appeared

(name and title of officer)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under the PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

Notary Public

(Seal)

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5345-34

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Rev. 1/22/08

RODAN BUILDERS, INC.

EXHIBIT B

EXHIBIT B



Division Manager
Transportation & Hydraulics Services Division
Department of Public Works
200 E. Santa Clara Street, 7th Floor
San Jose, CA 95113
Fax: (408) 292-6293

Attention: Michael O'Connell, Division Manager

Subject: Response to Bid Rejection for Albany-Keily Storm Drain Improvement
Phase V-VI Project

Dear Mr. O'Connell:

We just received the rejection letter for the project reference above and tried to call Huggen
Angeles.

The reason we did not list a stamped asphalt sub is because there amount was less than 1/2 of one
percent of the total bid. By our calculations:

| | |
|----------------------------------|--------------|
| Total Rodan Builders Bid Amount: | \$855,053.80 |
| 1/2 of one percent | \$4,275.27 |

| | |
|---|------------|
| Cook Engineering (Certified Applicant): | \$4,087.00 |
|---|------------|

Based on these facts, we believe its reasonable to reject the other bidders protest and award to the
lowest responsive bidder Rodan Builders Inc.

Sincerely,

A handwritten signature in dark ink, appearing to be "D. Oliver", written over a horizontal line.

Dan Oliver
Vice President

Attachments: Cook Engineering Inc Bid Proposal
Cc: file



03 Fitzgerald Road
Mecho Cardova, CA 97542

INC. Office 916-631-1365
Fax 916-631-1366
www.cookengineeringinc.com
Lic. No. 816602 A

BID PROPOSAL#:5341-SP

Submitted to:
Paul Gage
Rodan Builders
859 Cowen Road
Burlingame Ca.

Phone # 1-650-508-1700
Fax # 1-650-508-1705
pgage@rodanbuilders.com

Project:
StreetPrint Stamped Asphalt
Albany Kiely Storm Drain Improvement

Proposal Date:

Valid Through:

We have included the following items in our proposed price:

Jun-11-09

Sep-30-09

| Bid Item | Description of Work | Quantity | UM | Unit Price | Total Price |
|----------|--|----------|----|------------|-------------|
| 9 | STREETPRINT DECORATIVE PAVING | 1340 SF | | \$3.05 | \$4,087.00 |
| | Reheat new pavement and imprint with standard field pattern Apply Premium Series HW StreetBond Surfacing System-Standard Color for Stamp Field Areas | | | | |

Total

\$4,087.00

Item quantities included in the lump sum price are estimates only and are furnished solely for Customer's convenience. Since quantities are not provided by the engineer, our own takeoff quantities are used. If those quantities differ during construction due to an error or a change in the plans, a unit price will be provided to cover the variances.

The Following Items are Exclusions from this Proposal if Marked with a Check Box

General Conditions Exclusions

- ☒ Inspections, geotechnical testing and soil suitability studies
- ☒ Construction Permits, Encroachment Permits and Special Fees
- ☒ Procurement of Water for Construction or payment of fees to procure water for construction. Allowances for travelling distances to obtain construction water
- ☒ Trade agreements. Costs incurred by others as a result of labor unrest, pickets, job shutdowns or other issues related to any lack of trade agreements
- ☒ Performance or payment bonds (add 1.5% of bid to price for this requirement)
- ☒ Waiver of Subrogation on Workers Comp Insurance for jobs over \$250,000 (add .001% of bid to price for this requirement)
- ☒ CG2010 11/85 Form from Insurance Company
- ☒ Prevailing wages
- ☒ Design engineering, surveying and staking
- ☒ Responsibility for Asphalt or Concrete Handicap Ramps, as shown on drawings, being in compliance with State or Federal ADA guidelines
- ☒ Multiple move- ins, unless noted otherwise
- ☒ Weekend or overtime work, unless noted otherwise
- ☒ As-built drawings on volumes
- ☒ Price escalation protection for jobs lasting beyond 1 year

Paving Exclusions

- ☒ Seal Coats
- ☒ Asphalt Concrete Paving and any required repairs
- ☒ Striping & Signage

Street Print Exclusions

- ☒ When printing on paving that has been done by others, responsibility for unsatisfactory results because of quality of paving. Repairs for Chipping Adjacent Concrete surface edges as a result of settling due to non optimally compacted or stable Asphalt, Base or Subgrade. Responsibility for results due to "Course and Unfinished" Asphalt
- ☒ When printing on paving done by others: Correcting Heavily Segregated or Open Textures utilizing Hot Mix Asphalt or "StreetBond Base Coat Filler". If In CEI's opinion corrections are needed to help achieve desirable results, a Change Order Request will be issued to customer to provide such work.
- ☒ Providing multiple move-ins and working in shorter time limits with loss of estimated productivity due to cooler temperatures and unfavorable weather conditions. Responsibility for job delays due to customers lack of foresight to schedule StreetPrint prior to arrival of unfavorable weather conditions.
- ☒ Responsibility for accelerated coating wear if customer opens the coated surface to traffic before the polymers in the coating have set up.
- ☒ Responsibility for variations in color between samples and finished product
- ☒ Phasing of work areas for convenience of others which affects productivity requirements (unless stated above in work description)
- ☒ When work is barricaded after completion of colorbonding, responsibility for damages made by unauthorized entry into the protected area
- ☒ Waterwashing or Steam - Cleaning pavement of foreign materials unless specified in scope of work. Pre-existing Diesels or Oils on Pavement will prevent desirable results for which Cook Eng. Inc. will not be responsible.
- ☒ Guarantees for Color Bonding to adhere to Oil Spots or other foreign materials on pavement
- ☒ Guarantees of satisfactory results from StreetPrinting over Seal Coats. Removal of Seal Coat by Sandblasting or other means.
- ☒ Notification to Seal Coaters of the requirement not to Seal Coat in StreetPrint Area and marking of limits for the convenience of the Seal - Coaters.
- ☒ Restocking of Materials and Templates. There will be a 25% restocking charge for changes made after procurement of the contract materials and templates
- ☒ Notification to Strippers of the requirement not to Stripe in StreetPrint Area and marking of limits for the convenience of the Strippers
- ☒ Guarantees of satisfactory results from StreetPrinting over Striping. Removal of Striping by Sandblasting, Grinding or other means.
- ☒ Colorbonding over utility boxes and Manhole lids (utility boxes and manhole covers will not be colorbonded unless specifically directed to do so)
- ☒ Some mixes may not be suitable for StreetPrinting. If excessive sticky mix or any other situation (such as rubberized mixes and bonifibers) is encountered whereas we can't make a clean impression, work will stop, customer will be notified, and Cook Eng. Inc. will not be liable for not being able to perform work or liable for restoring work area to original condition.

Utilities (Miscellaneous) Exclusions

- ☒ Replacement of damaged utilities with chemical treatment areas
- ☒ Removal, relocation or adjustment of existing utilities or those of other contractors
- ☒ Mechanical compaction of trenches by other trades or responsibility for subsidence of such trenches
- ☒ Damage to installed or existing utilities that lay within 12" of finished subgrade

We Propose hereby to furnish material, equipment, and labor - complete in accordance with above specifications, for the sum of:

Four Thousand Eighty Seven and NO/100

\$4,087.00

Payment Terms / Legal Clarifications

PAYMENT IS DUE UPON COMPLETION AND PAST DUE AFTER THIRTY (30) DAYS:

The Customer agrees to pay late charges on any billings not paid when due, from the due date until paid, at the rate of 18% per annum or the maximum rate allowed by law, whichever is less.

If a project is of longer duration (more than 30 days), Cook Eng. Inc., Inc. shall receive progress payments monthly in proportion to the amount of work completed. In order to receive progress payments, Cook Eng. Inc. will furnish the customer a schedule of values for the contract. Within Ten (10) days after Customer receives a statement from Contractor setting forth the proportionate part of the work which Contractor's estimate shows to have been earned during the period covered by such statement, Customer will pay to Contractor the amount set forth by such progress statement. The Customer may elect to hold a retainage of up to 10% of the value of the work performed as security until all work has been completed. Retainage will become due thirty five (35) days after final completion of the work performed for the project.

For long duration projects, Cook Eng. Inc., Inc. elects the following special payment conditions that will apply to this contract:

Cook Eng. Inc., Inc. shall be paid in full (100%) 35 days after completion of all items of work covered by this contract. This shall apply even if the work has not been accepted by the governing agency or client, if such delay is due to items of work not included in our contract, the amount of retention held by the Customer shall be reduced from 10% to 2%. The Remaining 2% due Cook Eng. Inc., Inc. shall be paid within thirty-five (35) days after completion of the minor punchlist items.

Upon satisfactory payment being made for any portion of the work performed, the contractor shall furnish a full and unconditional release from any claim or mechanic's lien for that portion of the work for which payment has been made.

In the event payment is not made to Cook Eng. Inc., Inc. at the times and in the amounts provided for in this agreement, Cook Eng. Inc., Inc. may, upon three (3) working days written notice, elect to suspend work until payment on the amount owing has been received. If this occurs Cook Eng. Inc., Inc.'s time for performance shall be extended appropriately and it's reasonable costs of shut down, delay and start-up shall be paid and the contract adjusted accordingly.

Prior to commencement of work, Customer shall furnish Cook Eng. Inc. with written confirmation from his lender or bank that sufficient funds have been committed and will be available to make payments called for under these pay conditions. Furnishing such written confirmation to Cook Eng. Inc. to act is a condition precedent to the obligation of Cook Eng. Inc. to perform. This provision is solely for CEI's protection and shall not limit CEI's right to receive payment for its work if it proceeds with work without, or prior to receipt of such written confirmation.

General Conditions

Changes In Work: Customer may from time to time by instructions or drawings issued to contractor, make changes in the scope of work. Issue additional instructions, request additional work or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications and additions with the same effect as if they were embodied in the original contract. The price or the formula for establishing the price for such work will be set forth in a written change order, either prior to the commencement or as soon as practical thereafter.

Extra costs Incurred due to loss of production or delays outside our control to be paid on a time & material basis

Should either party bring suit in court to enforce any of the terms hereof, it is agreed that the prevailing party shall be entitled to a judgment for his/her costs and reasonable attorney's fees.

Unavoidable Delays - Extension Of Time: In the event Contractor shall be delayed in the performance of the work under this contract by causes beyond the control of the contractor, and without the fault or negligence of the contractor, including but not limited to change orders, acts of god or of the public enemy, Y2K problems, acts of government, fire, flood, strikes, inclement weather, including over optimum moisture content of ground or base course, unsuitable ground conditions or delays caused by Vendors and other Contractors, Contractor shall have such period of time to complete the performance of this contract as shall be necessary as a result of any such causes.

Prior to commencement of construction, if this proposal is not executed to constitute the official contract, a contract containing terms mutually agreeable to both parties shall be prepared and executed. The Contents of this proposal document shall be inserted electronically or physically attached to become an integral part of the contract. In the event of any inconsistency between any such contract and this proposal, the terms of this proposal shall prevail.

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control.

Authorized Signature: Sean P. Cook

Sean Cook, President

Date: 6/11/2009

Estimator: SPC

Reviewed By: _____

Acceptance of Proposal by Customer

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Acceptance indicates that funds are available for this work and Cook Engineering, Inc. will be paid as outlined within this proposal. In the event it is necessary to employ an attorney to enforce the terms of the contract, the customer agrees to pay a reasonable sum for attorney's fees. Acceptance represents that owner has read and understood, and relies thereon on this entire document.

Signature: _____

Printed Name: _____

Date: 6/11/2009



Division Manager
Transportation & Hydraulics Services Division
Department of Public Works
200 E. Santa Clara Street, 7th Floor
San Jose, CA 95113
Fax: (408) 292-6293

Attention: Michael O'Connell, Division Manager
Subject: Response to Bid Rejection for Albany-Keily Storm Drain Improvement
Phase V-VI Project

Dear Mr. O'Connell:

We just received the rejection letter for the project reference above and tried to call Huggen Angeles.

The reason we did not list a stamped asphalt sub is because there amount was less than 1/2 of one percent of the total bid. By our calculations:

| | |
|---|--------------|
| Total Rodan Builders Bid Amount: | \$855,053.80 |
| 1/2 of one percent | \$4,275.27 |
| Cook Engineering (Certified Applicant): | \$4,087.00 |

Based on these facts, we believe its reasonable to reject the other bidders protest and award to the lowest responsive bidder Rodan Builders Inc.

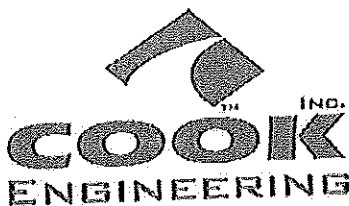
Sincerely,

A handwritten signature in dark ink, appearing to read "Dan Oliver", is written over a horizontal line.

Dan Oliver
Vice President

Attachments: Cook Engineering Inc Bid Proposal
Cc: file

Rodan Builders Inc., 859 Cowan Road, Burlingame CA 94010
phone 650-508-1700 fax 650-508-1705



.03 Fitzgerald Road
 mcho Cordova, CA 97542
 INC. office 916-631-1365
 ix 916-631-1366
 www.cookengineeringinc.com
 A Lic. No. 816602 A

BID PROPOSAL#:5341-SP

Submitted to:
 Paul Gage
 Rodan Builders
 859 Cowen Road
 Burlingame Ca.

Phone # 1-650-508-1700
 Fax # 1-650-508-1705
 pgage@rodanbuilders.com

Project:
 StreetPrint Stamped Asphalt
 Albany Kiely Storm Drain Improvement

Proposal Date: Jun-11-09 Valid Through: Sep-30-09

We have included the following items in our proposed price:

| Bid Item | Description of Work | Quantity | UM | Unit Price | Total Price |
|----------|--|----------|----|------------|-------------|
| 9 | STREETPRINT DECORATIVE PAVING Reheat new pavement and imprint with standard field pattern Apply Premium Series HW StreetBond Surfacing System-Standard Color for Stamp Field Areas | 1340 SF | | \$3.05 | \$4,087.00 |

Total \$4,087.00

Item quantities included in the lump sum price are estimates only and are furnished solely for Customer's convenience. Since quantities are not provided by the engineer, our own takeoff quantities are used. If those quantities differ during construction due to an error or a change in the plans, a unit price will be provided to cover the variances.

The Following Items are Exclusions from this Proposal if Marked with a Check Box

General Conditions Exclusions

- ☒ Inspections, geotechnical testing and soil suitability studies
- ☒ Construction Permits, Encroachment Permits and Special Fees
- ☒ Procurement of Water for Construction or payment of fees to procure water for construction. Allowances for travelling distances to obtain construction water
- ☒ Trade agreements. Costs incurred by others as a result of labor unrest, pickets, job shutdowns or other issues related to any lack of trade agreements
- ☒ Performance or payment bonds (add 1.5% of bid to price for this requirement)
- ☒ Waiver of Subrogation on Workers Comp Insurance for jobs over \$250,000 (add .001% of bid to price for this requirement)
- ☒ CG2010 11/85 Form from Insurance Company
- ☒ Prevailing wages
- ☒ Design engineering, surveying and staking
- ☒ Responsibility for Asphalt or Concrete Handicap Ramps, as shown on drawings, being in compliance with State or Federal ADA guidelines
- ☒ Multiple move- ins, unless noted otherwise
- ☒ Weekend or overtime work, unless noted otherwise
- ☒ As-built drawings on vellums
- ☒ Price escalation protection for jobs lasting beyond 1 year

Paving Exclusions

- ☒ Seal Coats
- ☒ Asphalt Concrete Paving and any required repairs
- ☒ Striping & Signage

Street Print Exclusions

- ☒ When printing on paving that has been done by others, responsibility for unsatisfactory results because of quality of paving. Repairs for Chipping Adjacent Concrete surface edges as a result of settling due to non optimally compacted or stable Asphalt, Base or Subgrade. Responsibility for results due to "Course and Unfinished" Asphalt
- ☒ When printing on paving done by others: Correcting Heavily Segregated or Open Textures utilizing Hot Mix Asphalt or "StreetBond Base Coat Filler". If in CEI's opinion corrections are needed to help achieve desirable results, a Change Order Request will be issued to customer to provide such work.
- ☒ Providing multiple move-ins and working in shorter time limits with loss of estimated productivity due to cooler temperatures and unfavorable weather conditions. Responsibility for job delays due to customers lack of foresight to schedule StreetPrint prior to arrival of unfavorable weather conditions.
- ☒ Responsibility for accelerated coating wear if customer opens the coated surface to traffic before the polymers in the coating have set up.
- ☒ Responsibility for variations in color between samples and finished product
- ☒ Phasing of work areas for convenience of others which affects productivity requirements (unless stated above in work description)
- ☒ When work is barricaded after completion of colorbonding, responsibility for damages made by unauthorized entry into the protected area
- ☒ Waterwashing or Steam - Cleaning pavement of foreign materials unless specified in scope of work. Pre-existing Diesels or Oils on Pavement will prevent desirable results for which Cook Eng. Inc. will not be responsible.
- ☒ Guarantees for Color Bonding to adhere to Oil Spots or other foreign materials on pavement
- ☒ Guarantees of satisfactory results from StreetPrinting over Seal Coats. Removal of Seal Coat by Sandblasting or other means.
- ☒ Notification to Seal Coaters of the requirement not to Seal Coat in StreetPrint Area and marking of limits for the convenience of the Seal - Coaters.
- ☒ Restocking of Materials and Templates. There will be a 25% restocking charge for changes made after procurement of the contract materials and templates
- ☒ Notification to Stripers of the requirement not to Stripe in StreetPrint Area and marking of limits for the convenience of the Stripers
- ☒ Guarantees of satisfactory results from StreetPrinting over Striping. Removal of Striping by Sandblasting, Grinding or other means.
- ☒ Colorbonding over utility boxes and Manhole lids (utility boxes and manhole covers will not be colorbonded unless specifically directed to do so)
- ☒ Some mixes may not be suitable for StreetPrinting. If excessive sticky mix or any other situation (such as rubberized mixes and bonifibers) is encountered whereas we can't make a clean impression, work will stop, customer will be notified, and Cook Eng. Inc. will not be liable for not being able to perform work or liable for restoring work area to original condition.

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Extra costs incurred due to loss of production or delays outside our control to be paid on a time & material basis

Should either party bring suit in court to enforce any of the terms hereof, it is agreed that the prevailing party shall be entitled to a judgment for his/her costs and reasonable attorney's fees.

Unavoidable Delays - Extension Of Time: In the event Contractor shall be delayed in the performance of the work under this contract by causes beyond the control of the contractor, and without the fault or negligence of the contractor, including but not limited to change orders, acts of god or of the public enemy, Y2K problems, acts of government, fire, flood, strikes, inclement weather, including over optimum moisture content of ground or base course, unsuitable ground conditions or delays caused by Vendors and other Contractors, Contractor shall have such period of time to complete the performance of this contract as shall be necessary as a result of any such causes.

Prior to commencement of construction, if this proposal is not executed to constitute the official contract, a contract containing terms mutually agreeable to both parties shall be prepared and executed. The Contents of this proposal document shall be inserted electronically or physically attached to become an integral part of the contract. In the event of any inconsistency between any such contract and this proposal, the terms of this proposal shall prevail.

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Authorized Signature: Sean P. Cook
Sean Cook, President

Estimator: SPC

Date: 6/11/2009

Reviewed By : _____

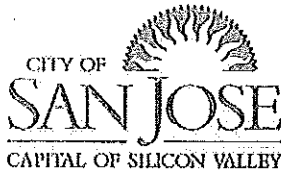
Acceptance of Proposal by Customer

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Acceptance indicates that funds are available for this work and Cook Engineering, Inc. will be paid as outlined within this proposal. In the event it is necessary to employ an attorney to enforce the terms of the contract, the customer agrees to pay a reasonable sum for attorney's fees. Acceptance represents that owner has read and understood, and relies thereon on this entire document.

Signature: _____

Printed Name: _____

Date: 6/11/2009



Department of Public Works

TRANSPORTATION AND HYDRAULICS SERVICES DIVISION

July 8, 2009

Dan Oliver
Rodan Builders, Incorporated
1625 El Camino Real #3
Belmont, CA 94002

Dear Mr. Oliver:

**SUBJECT: REJECTION OF BID PROPOSAL FOR THE ALBANY-KIELY
STORM DRAIN IMPROVEMENT, PHASE V-VI PROJECT**

The City received a formal bid protest after the Notification of Intent to Award was posted for the subject project on June 29, 2009. City staff completed the bid protest review and has determined that your company's proposal is non-responsive and regrettably rejects the bid per Section 2-1.15 of the City's 1992 Standard Specifications, and Section 39-1.01, Stamped Asphalt Concrete of the project's Special Provisions.

Rodan Builders, Incorporated failed to list a subcontractor in the bid package. Bid item No.9, Stamped Asphalt, requires a certified contractor to perform the work. Furthermore, the company's bid extension for this line item exceeds 1/2 of one percent of the total bid, Section 2-1.15 of the City's 1992 Standard Specifications allowable without listing a subcontractor.

If you have any questions regarding this matter, please contact Huggen Angeles at (408) 975-7482.

Sincerely,

Michael O'Connell
Division Manager
Transportation & Hydraulics Services Division

RECEIVED
JUL 13 2009
RODAN BUILDERS, INC.